Supreme Court, U.S.
FILED

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No. 96 497 AUG 21 1996

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In The

Supreme Court of The United States

October Term, 1995

Charles Taylor Construction Company;
Charlie Taylor,

Petitioner,

v.

United States of America, United States Small Business Administration; Department of Defense; James P. Guyer, District Director; Mike Enriquez, Assistant District Director,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does 42 U.S.C. Section 2000d provide a basis for requested relief and permit jurisdiction against the Small Business Administration?

2. Does the Constitution prohibit the requested relief, a declaratory judgement "prohibiting the disproportionate awarding of contracts to hispanic owned firms to a fair, appropriate set aside of contracts to black owned firms?"

3. Does the District Court have jurisdiction over Petitioner's claim for contract damages?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner: Charlie Taylor Construction Company, Inc. and Charlie Taylor Individually

Respondent: United States of America

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PETITION FOR A WRIT OF CERTIORARI
PRELIMINARY STATEMENT

Petitioner, Charlie Taylor Construction Company, petitions for a writ of certiorari to review the Judgement of the United States Court of Appeals for the District of Columbia which affirms the Judgement of the United States District Court for the District of Columbia, finding no jurisdiction to Petitioner's assertion that a disproportionate number of contracts were steered to Hispanic owned contractors by SBA regional officials who are Hispanic, to the detriment of the Petitioner, an African-American owned firm with the 8(a) Minority Small Business Set Aside Program.

OPINIONS BELOW

The Order granting Summary Judgement of the United States District Court for the District of Columbia, entered October 18, 1994, is unreported. The Decision of the United States Court of Appeals for the District of Columbia circuit granting summary affirmance, dated May 22, 1995 is unreported.

JURISDICTION

The judgement sought to be reviewed was entered on May 22, 1995.

This Court's jurisdiction to review a Judgement of the United States Court of Appeals for the District of Columbia, affirming the Judgement of the United States District Court for the District of Columbia in favor of the government is invoked pursuant to 28 U.S.C. Section ___ _____.

This petition is timely filed within 90 days of the decision by the District of Columbia Circuit on May 22, 1995.

STATUTES INVOLVED

15 U.S.C. Section 637, Small Business Administration 8(a) Program.

42 U.S.C. 1981 and 2000d

Fifth Amendment

Fourteenth Amendment

STATEMENT OF THE CASE

Petitioner was a firm in good standing in the Small Business Administration 8(a) Small Business Set Aside Program. The Petitioner is an African-American owned firm in the State of Arizona, in which the political climate and administration of the 8(a) program caused excessive contracts to be steered to Hispanic owned firms to the detriment of African-American owned firms. Hispanic owned firms received the majority of the contracts, which Petitioner believes were done arbitrarily and capriciously because the SBA selecting official was Hispanic himself. Petitioner initiated administrative complaints to the Office of Civil Rights Compliance of SBA, and attempted to resolve this matter administratively without any action on his complaint. Petitioner alleged his constitutional rights were being violated because of the unfair amount of contracts that were steered to Hispanic owned firms merely because they are Hispanic, thus denying Petitioner contracts to which he was entitled to compete competitively even within the 8(a) program. SBA as the agency in effect, selects contractors to receive the contract prior to the competitive format even within the 8(a) program has the sole power to actually place an award acting as the prime contractor with a sub contractor. The District Court dismissed the matter stating that in it's opinion 42 U.S.C. 2000d does not apply to a federal agency such as SBA. Citing Fagan v. United States, Small Business Administration, 783 F Sup. 1455 1465-66 Note 10 (DDC)(Hogan, J.), affd. 19F.3d 684 (DCC 1992). The Court distinguished Fordice Construction Co. v. Marsh, 773 F.Supp 867 (SD Miss. 1990), saying that Fordice did not speak to the method of allocating contracts to firms already within the 8(a) program. However, the Court ignored the provisions of that case which found that placement under that program was arbitrary and

capricious. The Court accepting the government's argument appears to concur in the government's argument that it cannot give a declaratory judgement ensuring fair and equitable administration of the 8(a) program.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS IMPORTANT, UNANSWERED QUESTIONS AND CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT AND STATUTORY LAW

Appellant believes that it has satisfied the findings of Fagan, "Under 14th Amendment document, a finding of racially discriminatory purpose is necessary and a showing of a racially disproportionate impact is not enough. Citing Washington v. Davis, 426 U.S. 229, 242 48 Lawyers Addition 2d 597, 96 Supreme Court 2040 (1976)". The facts of this case are unique. Petitioner, Charlie Taylor, is alleging that as an African-American firm within the 8(a) Minority Small Business Program, he was so discriminated against because a disproportionate amount of contracts were steered to Hispanic owned contractors solely because of the Hispanic principals of those firms.

Appellant believes that Liberty Construction v. Small Business Administration, does provide jurisdiction at 9 F.3d 800. The Appellate Court in the Ninth Circuit overturned a District Court dismissal of cross complaints for lack of subject matter jurisdiction. The District Court and the Court of Appeals for the District of Columbia decision is at odds with Liberty Construction, supra. The Court in Liberty cited Munoz v. Small Business Administration, 644 F.2d 1361, which held that the SBA's "sue and be sued" provision vested jurisdiction in the

District Court over claims against the SBA. The Court in the Ninth Circuit rejected what the Court of Appeal in the District of Columbia found, and said that in cases involving actions against SBA for money damages in excess of $10,000, jurisdiction properly lies in a District Court even though the Tucker Act had vested in the Court of Claims jurisdiction of contract claims against the government. In citing Munoz, supra. the Court noted that Judge Wallace has observed jurisdiction under the Tucker Act is not exclusive, but other statues independently confer jurisdiction and waive sovereign immunity.

Further, this Decision is at odds with Regents of the University of California v. Bakke, 438 U.S. 265, 57 L.Ed 2d 750, 98 S.Ct. 2733 (1978). "The injury in fact" element of standing in such an equal protection case is the denial of equal treatment, resulting from the imposition of the barrier, the inability to compete on an equal footing in the bidding process. To establish standing, therefore petitioner need only demonstrate that it's members are able and ready to bid on contracts and that a discriminatory policy prevents them from doing so on an equal basis. See Northeast Florida Chapter Associated General Contractors v. Jacksonville, 133 Supreme Court 2297; 1993 U.S. Lexis 4025; 124 Lawyers Edition 2nd 586; 61 U.S.L.W. 4626.

The same principles the Court found discrimination in Northeast, it should do so in the case herein.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 94-5365 September Term, 1994

93cv01358

Charles Taylor Construction Company;
Charlie Taylor,

Appellant

v.

United States of America, United States Small Business Administration; Department of Defense; James P. Guyer, District Director; Mike Enriquez, Assistant District Director

BEFORE: Ginsburg, Sentelle, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its order filed October 18, 1994. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297

(D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

Initials of the Judges

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1358 (NHJ)

CHARLIE TAYLOR CONSTRUCTION COMPANY, ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

MEMORANDUM ORDER

Plaintiffs bring this action challenging the allocation of contracts under the section 8(a) set-aside program administered by the United States Small Business Administration ("SBA"), defendant herein. See 15 U.S.C. § 637. Charlie Taylor Construction Company is an African-American-owned business licensed to remodel and build buildings in Arizona. Plaintiffs protest the allegedly disproportionate share of contracts that have been awarded to Hispanic-owned firms through the SBA's 8(a) program. They allege violations of 42 U.S.C. §§ 1981 & 2000d, and the Fifth and Fourteenth[1] Amendments of the United States Constitution. Presently pending is the motion of defendants to dismiss. After careful consideration of the complaint, the motion, and the supporting and opposing memoranda, the

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[1] Any suggestion that the federal defendants have violated the Fourteenth Amendment is hereby rejected for obvious reasons.

Court will dismiss this action for reasons set forth below.

The Court notes at the outset that 42 U.S.C. § 2000d appears to provide no basis for the requested relief, as courts have held that the statute does not apply to federal agencies, such as SBA, that directly provide government benefits. See Fagan v. United States Small Business Admin., 783 F. Supp. 1455, 1465-66 n.10 (D.D.C.) (Hogan, J.), affd., 19 F.3d 684 (D.C. Cir. 1992) (table); see also Soberal-Perez v. Heckler, 717 F.2d 36, 38-41 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984).

Moreover, there is simply no basis in the law of equality for the requested relief, a declaratory judgment "prohibiting the disproportionate awarding of contracts to hispanic owned firms to a fair, appropriate setting aside of contracts to black owned firms." Complaint at 5. Fordice Construction Co. v. Marsh, 773 F. Supp. 867 (S.D. Miss. 1990), the chief case relied upon by plaintiffs, merely declared that the decision to set aside 100% of small business contracts under the 8(a) program was an improper exercise of statutory and regulatory authority by the SBA and Army Corps of Engineers. Fordice did not speak to the method of allocating contracts to firms already within the 8(a) program. Moreover, the 8(a) program does not appear to guarantee any particular group a proportionate or "appropriate" share of business. See 15 U.S.C. § 637 (a) and accompanying regulations.

Nor does this Court have jurisdiction over plaintiff's claim for contract damages. See 28 U.S.C. 1346 (a) (2); cf. Bakersfield City Sch. Dist. of Kern County v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979).

This entire action must, therefore, be dismissed.

Accordingly, it is this 18th day of October, 1994,

ORDERED that the motion of defendants to dismiss be, and hereby is, granted; and it is further

ORDERED that this case be, and hereby is, dismissed.

s/_____
Norma Holloway Johnson
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5365
(C.A. No. 93-1358)

CHARLIE TAYLOR CONSTRUCTION CO, ET AL.,
Appellants,

v.

U.S. SMALL BUSINESS ADMINISTRATION, ET AL.,

Appellees.

MOTION FOR SUMMARY AFFIRMANCE

Appellees respectfully move this Court for summary affirmance of the October 18, 1994 Order of the District Court, copy attached, which entered judgment in appellees' favor. Summary disposition is appropriate here because the record indicates that "the merits of this appeal are so clear as to make summary affirmance proper." Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980); accord Ambach v. Bell, 686 F.2d 974, 979 (D.C. Cir. 1982) (per curiam).

I.

Plaintiffs filed an amended complaint in which they claimed to be a minority small business concern participating in the Small Business Administration's (SBA's) 8 (a) program. See 15 U.S.C. § 637. See Mem. at 1. Plaintiffs alleged that SBA has discriminated against them "in giving a disproportionate amount of business to hispanic owned

firms, versus that owned by blacks . . . ." See Amended Complaint at 3. Plaintiffs rely upon 42 U.S.C. § 1981 and 2000d, as well as the Fifth and Fourteenth Amendments. See Complaint; Mem. at 1.

In response to Defendant's motion to dismiss, the District Court carefully considered Plaintiffs' causes of action and found all of them to be without merit. See Mem. at 2. The Court noted first that 42 U.S.C. § 2000d did not provide a basis for the requested relief, as courts have held that the statute does not apply to federal agencies, such as SBA, that directly provide Government benefits. Id., citing, Fagan v. United States Small Business Admin., 783 F. Supp. 1455, 1465-66, n.10 (D.D.C.), aff'd., 19 F.3d 684 (D.C. Cir. 1992). The Court then held that there was no basis in law for Plaintiff's requested relief for a declaratory judgment "prohibiting the disproportionate awarding of contracts to hispanic owned firms to a fair, appropriate setting aside of contracts to black owned firms." See Mem. at 2, quoting, Complaint at 5. The District Court also concluded that it lacked jurisdiction over Plaintiffs' claim for contract damages. See Mem. at 2, citing, 28 U.S.C. § 1346(a)(2); c.f. Bakersfield City Sch. Dist. of Kern County v. Boyer, 610 F.2d, 621 (9th Cir. 1979). In light of these holdings, the Court dismissed the action. This appeal followed.

II.

The 8(e) program is intended generally to "foster and promote business enterprises of 'disadvantaged' persons and entities." See Eastern Canvas Products, Inc. v. Brown, 580 F.2d 675, 677-78 (D.C. Cir. 1978). The constitutionality of the program as presently structured has been upheld by the courts. Id. at 677 and authorities cited therein. Under the 8(a) program, SBA arranges with other federal agencies to supply those agencies with goods and services as a prime

contractor. There is no fixed percentage of government procurements that are made part of the 8(a) program. SBA then subcontracts with eligible 8(a) program participants to actually supply the goods and services. Id.; see also 15 U.S.C. § 637(a). A person does not have to be a racial minority to be an eligible program participant. Rather, SBA's regulations provide for participation by a broader array of disadvantaged persons. See 13 C.F.R. § 124.101-09. Importantly, SBA does not assign subcontracts to individual eligible program participants. Instead, most of the subcontracts involve competition among eligible participants. See 13 C.F.R. § 124.311(a). Moreover, SBA does not make the selections among the competing participants. The procuring agencies make the selections based upon the evaluation criteria in the solicitation and the Federal Acquisition Regulation. See 13 C.F.R. § 124.311(f)(3).

Given the structure of the 8(a) program described above, to the extent Plaintiffs complained about discrimination with regard to selections for specific Government contracts, they sued the wrong party. SBA does not make those selections. Instead, those selections are made by the procuring agencies. 13 C.F.R. § 124.311(f)(3). Here, the Amended Complaint did not even allege what agencies were procuring the listed contracts.

To the extent that Plaintiffs sought monetary damages for lost profits for contracts they claim they should have received, the District Court lacked subject matter jurisdiction over their claims. The Amended Complaint sought monetary damages in the amount of $1,600,000.00. This Court's jurisdiction, however, is limited to claims not exceeding $10,000.00. See 28 U.S.C. § 1346(a)(2).

To the extent Plaintiffs seek an injunction for an "appropriate setting aside of contracts to black owned firms"

the program at issue does not entitle them to such an injunction. As explained above, the statute at issue does not provide for contracts to be set aside for any particular minority group. Moreover, such a declaration would be meaningless in any event. Plaintiffs provide no guidance as to what they believe would be an "appropriate" amount of contracts that they should receive.

WHEREFORE, appellees respectfully submit that the judgment of the District Court should be summarily affirmed.

ERIC H. HOLDER, JR.
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

ROBERT L. SHAPIRO
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

No. 94-5365

CHARLIE TAYLOR CONSTRUCTION COMPANY,
and CHARLIE TAYLOR,

Appellant,

v.

UNITED STATES OF AMERICA, et. al.,

Appellees.

AFFIRMATION IN OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

Appellant respectfully requests that this Court deny Appellee's Motion for a Summary Affirmance.

Appellees misconstrue the thrust of Appellant's redress under the Fifth and Fourteenth Amendments.

Appellant is not merely seeking what it believes to be an appropriate or correct proportion of amounts.

What Plaintiff is challenging is a violation of its Civil Rights, premised on its race, because the Administrator of the Regional Small Business Administration District, steered contracts to Hispanic owned firms within the 8(a) program. There are numerous firms within the 8(a) program, within this geographical region. Appellant is a black owned 8(a) firm, and it is not asking that it receive any "certain" percentage of contracts. Appellee cites Fagan v. United

States Small Business Administration, 783 F. Supp 1455, 1465-66, Affirmed 19 F.3d 684 (DC Cir. 1992). That case is not on point. In that case, a white woman challenged SBA's denial of her request for admission into an 8(a) set aside program for minority. As a matter of fact, the Plaintiff at a District Court Level in that case Fagan, supra., argued that Summary Judgment was inappropriate because she had not had a full opportunity to conduct discovery. The District Court ultimately said that there had been some discovery, and made a judgmental decision not to allow further discovery. In our particular case, there has been no discovery at all, which is important and relative to the case. Plaintiff was seeking redress in Fagan, alleging arbitrary and capricious denial of her entry into that program.

With respect to the proposition that Defendant is citing Fagan alleging that Plaintiff failed to make a prima facia case under 42 U.S.C. 2000 D, the Court in Fagan noted that a Plaintiff has to demonstrate a racially discriminatory purpose, which we have alleged in our particular case. The Court in Fagan said, "Under Fourteenth Amendment Doctrine, a finding of racially discriminatory purpose is necessary, and a showing of a racially disproportionate impact is not enough. Citing Washington v. Davis, 426 U.S. 229, 242 48L.ed 2d 597, 96 S Ct. 2040 (1976)." We have so alleged.

Further, the citation to Fagan as an appeal decision aff'd by Appellee, doesn't take into account the fact that the decision on its face page has a caveat under Local Rule 11(c) stating that it is an unpublished not to be cited as precedent.

Appellees cite Bakersfield City School District of Kern County v. Boyer, 610 F.2d 621 (9th Cir. 1979), concerning alleged lack of jurisdiction on contract damages.

We cite to this Court the case of Liberty Construction v. Small Business Administration, 9 F.3d 800; which held that the District Court below had jurisdiction. The Appellate Court in the Ninth Circuit, overturned a District Court Dismissal of cross complaints for lack of subject matter jurisdiction. The Court of Appeals held the District Court had jurisdiction over the claims against SBA, under the "sue and be sued" provision. The Court cited Munoz v. SBA, 644 F2.d 1361, holding that the SBA's "Sue and be sued" provision vested jurisdiction in the District Court over claims against the SBA. The Court said that in cases involving actions against SBA for money damages in excess of $10,000, jurisdiction properly lies in the District Court, even though the Tucker Act had vested in the Court of Claims jurisdiction of contract claims against the government. In citing Munoz, supra., the Court noted that Judge Wallace has observed jurisdiction under the Tucker Act is not exclusive, but other statutes independently conferred jurisdiction and waived sovereign immunity. Citing Pacificorp v. Federal Energy Regulatory Commission, 795 F.2d 816, 826, (9th Cir. 1985). The Board addressed the argument that many assumed that the Claims Court has exclusive jurisdiction of Tucker Act Claims for more than $10,000. The Court said that Munoz remains the law of the Ninth Circuit after the enactment of the Contracts Dispute Act and its amendment of the Tucker Act. Therefore, it agreed with the First Circuit that contract claims against the United States may be entertained by the District Courts, regardless of the amounts sought, so long as there exists a basis for jurisdiction independent of the Tucker Act.

Therefore, we respectfully request that this Court permit a full briefing schedule on the issues before the Court.

Respectfully submitted,

Sam Zalman Gdanski
10 Topaz Court
Suffern, New York 10901
(914) 368-3200

Dated: February 3, 1995

CERTIFICATE OF SERVICE

On this 3rd day of February 1995, I caused to be put into first class mail, postage prepaid, a copy of the Motion herein, addressed as follows:

Robert Shapiro
Assistant United States Attorney
555 Fourth Street, N.W., 10th Floor
Washington, D.C. 20001

_____
Sam Z. Gdanski

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5365
(C.A. No. 93-1358)

CHARLIE TAYLOR CONSTRUCTION CO, ET AL.,
Appellants,

v.

U.S. SMALL BUSINESS ADMINISTRATION, ET AL.,
Appellees.

APPELLEES' REPLY ON THEIR MOTION FOR SUMMARY AFFIRMANCE

Appellees have moved for summary affirmance of the October 18, 1994 decision of the District Court dismissing this action below. Appellants have opposed summary affirmance. Appellants' opposition appears to be limited to two issues: their claim under 42 U.S.C. § 2000d and the District Court's subject matter jurisdiction over their claim for contract damages. Appellants' argument with regard to the § 2000d issue is without merit. Their arguments with regard to the jurisdictional issue are both new and irrelevant, as appellants' do not have a viable cause of action even if the District Court has jurisdiction to hear it.

Appellants argue that they alleged a prima facie cause of a violation of 42 U.S.C. § 2000d in that they have alleged a racially discriminatory purpose in the SBA's actions. Appellants' argument misses the point of the District Court's decision. The District Court held that § 2000d does not

provide a cause of action against SBA regardless of the nature of the allegation. The Court held that § 2000d does not apply directly to federal agencies. Rather, it applies only to non-federal entities receiving federal financial assistance. See District Court Mem. at 2.

As Appellants' claim under 42 U.S.C. § 2000d is without merit and because they have not even disputed appellees' motion for summary affirmance with regard to their other causes of action, appellants are left without a viable cause of action. Therefore, it is not even necessary to reach the jurisdictional issue of whether the District Court would have had jurisdiction to consider appellants' claims.

Appellants argue that the District Court had subject matter jurisdiction over their claim for "contract damages" in excess of $10,000 pursuant to the SBA's sue and be sued statute. 15 U.S.C. § 634(b)(1). See Appellants' Opposition at 2-3. Although the District Court referred to this claim as one for "contract damages," it should be made clear that appellants' claim is for profits they claim they would have earned had they received more contracts. This argument and the authorities cited by appellants were never raised before the District Court. As appellants did not properly raise this argument below, it should not be considered by this Court. See, e.g., Association of Accredited Cosmetology Schools v. Alexander, 979 F.2d 859, 862 (D.C. Cir. 1992)/.

WHEREFORE, appellees respectfully submit that the judgment of the District Court should be summarily affirmed.

ERIC H. HOLDER, JR.
United States Attorney

R. CRAIG LAWRENCE
Assistant United States Attorney

ROBERT L. SHAPIRO
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served via first class mail to following this 13th day of February 1995:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1358

CHARLIE TAYLOR CONSTRUCTION COMPANY,
and CHARLIE TAYLOR

Plaintiff,

v.

UNITED STATES OF AMERICA, UNITED STATES SMALL BUSINESS ADMINISTRATION, UNITED STATES DEPARTMENT OF DEFENSE,
JAMES P. GUYER, District Director
MIKE ENRIQUEZ, Assistant District Director

Defendants.

AMENDED COMPLAINT

Charlie Taylor Construction Company is a minority small business concern as set forth in 15 U.S.C. 637(a) (1) (C).

The minority small business (8a) program as codified at 15 U.S.C. 637, provides that it shall be the duty of the administrator "to arrange for the performance of such procurement contracts by negotiating or otherwise letting sub contractors to socially and economically disadvantaged small business concerns for construction work, service or manufacturing, supply, assembly of articles, equipment, supplies, materials or parts thereof, for servicing or processing in connection therewith or with management services as may be necessary to enable the administration (SBA) to perform such contracts".

The Plaintiffs in this action allege jurisdiction under 42 U.S.C. 1981, and 2000(d), and claim denial of due process and equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States.

Declaratory relief and monetary damages are sought pursuant to 5 U.S.C. 701, et.seq. and 28 U.S.C. 2201 and 2202.

Jurisdiction is present because a Federal Question is asserted under 28 U.S.C. 1331. Original jurisdiction of a Civil Rights claim is also asserted under 28 U.S.C. 1343. Jurisdiction is also premised, based upon 28 U.S.C. 1346 and 1361, since the action is one against agencies of the United States, which seek to compel officers of the United States to perform duties owed to the plaintiffs.

The SBA is the Federal Agency created to assist small business concerns in securing contracts with the Federal Government. The 8(a) program is established as part of the Small Business Act, codified in 15 U.S.C. 687(a).

Briefly, a socially and economically disadvantaged small business concern as Charlie Taylor Construction Company is, is that which is at least 51% owned by one or more socially economically disadvantaged individuals, and who also meets the criteria of Section 637 (a) (5) which defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or a cultural bias because of their identity as a member of a group without regard to their individual qualities".

Section 37(a) (6) defines economically disadvantaged individuals as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital opportunities as

compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished capital and credit opportunities the administration (SBA) shall consider, but not be limited to the assets and net worth of said socially disadvantaged individuals."

Charlie Taylor Construction Company is one of the first prominent, premier firms performing work in what was later defined as SIC Code 1629, completing jobs for such as $2.8 million dollars for the Armoring Arizona Levee Middle Section Reach I, and Bank Stabilization Stockpiling Riprap and Gravel, Colorado Riverfront and Levee System, for $2.3 million.

Charlie Taylor Construction Company and Charlie Taylor allege discrimination pursuant to the statutes cited above against Charlie Taylor Construction Company and Charlie Taylor, by the SBA through its District, Region and Headquarters in giving a disproportionate amount of business to Hispanic owned firms, versus that owned by blacks who are also eligible for 8(a) set aside

Plaintiff herein has complained and initiated administrative complaints through the Office of Civil Rights Compliance of SBA and has attempted to resolve this matter administratively without success, dealing with the SBA.

Mr. Taylor has had his statements and complaints taken, and reviewed by Mr. Greenspan, Area Civil Rights Director for the SBA, Office of the Civil Rights Compliance Office, San Francisco, who forwarded his findings and recommendations to the Office of Civil Rights Compliance in Washington, D.C. Mr. Taylor has requested, through counsel, and through his own office, copies of any such recommendations from Ms. Doris Dockett, deputy to the Chief of Office of Civil Rights Compliance at the

Headquarters, U.S. Small Business Administration, Washington, D.C., to no avail.

As examples for discrimination, Charlie Taylor, the Plaintiff herein, has requested BDE, which has been previously denied in June of 1986 and in January 1989, and continues to be denied to Charlie Taylor. At the same time, the District Office, who initially denied the Plaintiff's request for BDE, approved said BDE expense for Maya Construction Company (an Hispanic firm) who received it twice. Upon information and belief, this was initially an increment of $500,000 and the second time through government surplus equipment, reaching a total of approximately $1 million.

With respect to contracts which have not been set aside for Charlie Taylor and other black owned firms, at the same time, John C. Corela (Hispanic firm) has been receiving an average of $5 million a year in contracts.

A company known as Sun Eagle (Hispanic firm) has received contracts grossly disproportionate to Charlie Taylor.

A firm known as Rodriguez (Hispanic firm) received two contracts in one day, while Charlie Taylor received a contract once every three years.

In addition, black owned firms generally receive nine years for a term within which the 8(a) program, while Hispanics receive twelve years.

Rodriguez Company, has a Class B license with the State of Arizona which permits him to remodel and build buildings. The SIC Code 1629 is for heavy construction or road work, and therefore he should more appropriately have a Class A license, which he does not have.

As another example, upon information and belief, a company known as Simpson Contracting, which is a black owned firm, went out and self marketed a project, which was taken away from him and given to Rodriguez Company, a Hispanic firm.

Charlie Taylor Construction Company seeks a declaratory judgment, prohibiting the disproportionate awarding of contracts to Hispanic owned firms to a fair, appropriate setting aside of contracts to black owned firms, specifically the plaintiffs herein and monetary damages as alleged below.

Upon information and belief, various contracts which Charlie Taylor competed for and was eligible for were denied him. Said actions consisted of the following contracts which were given to Hispanic owned contractors by administrators named in the amended complaint favoring Hispanic contractors to the detriment of black owned contractors under the 8(a) program. They consist of the following. Charlie Taylor competed for the following contracts. Additional contracts were awarded up until the current date. Charlie Taylor has requested this information under the Freedom of Information Act. These contracts were also improperly denied to Charlie Taylor:

SUN EAGLE CORPORATION
461 North Dean Avenue, Chandler, Arizona 85226

SBA Contr #	Agency Contr #	Award Date	SIC Code	Net Amount
98720114	FO2601-87-C0007	021987	1542	91,494.64
98720132	DACA09-87-0059	062587	1542	4,484,728.00
98720141	FO260087C0013	031087	1542	181,534.70
98720161	DACA09-87-C-0086	090387	1541	740,317.70
98720178	DAEA18-87-C-0042	050587	1799	11,167.72
98721100	FO2604-87-C0060	081087	1761	139,105.00
98826008	V678C-559	093088	1542	1,363,463.19
98826045	DACA09-88-C-0032	072588	1542	3,219.749.00
98826046	DAEA18-88-C-0019	060888	1541	157,660.36
98826058	50-8371-B-0037	071588	1629	321,820.28
98926024	DACAO9-89-C-0045	042089	1542	790,443.00
98926025	N62474-86-C-0492	033189	1629	1,860,299.00
98926037	50-91H2-9-946	061689	1761	245,000.00
98926053	FO2601-89-C9018	081889	1611	117,026.90
98926097	50-8371-9-0056	092789	1629	63,208.26
99026002	O-CC-32-00720	030290	1629	6,210,709.62
99026013	O-CC-32-00760	111389	1629	7,924,078.94
99026051	O-CC-40-09340	061980	1541	234,307.62
99026094	CX8210-0-0007	091290	1541	77,082.64
99025113	CX8000-0-9002	090590	1542	3,563,179.74
99026130	DACAO9-90-C-0053	091290	1542	9,714,512.00

21 41,528,882.55

Additional contracts were awarded up until the current date. Charlie Taylor has requested this information under the Freedom of Information Act. These contracts were also improperly denied to Charlie Taylor. Charlie Taylor competed for the following contracts which were given improperly to Maya Construction.

MAYA CONSTRUCTION
860 East 19th Street, Tucson, AZ 85719

SBA Contr #	Agency Contr #	Award Date	SIC Code	Net Amount
98720106	N62474-84-C-4357	070287	1541	3,839,291.00
98720107	V101C-1592	093087	1542	4,923,029.00
98720112	DAEA18-87-C0017	010787	1542	95,013.00
98720131	7-CC-30-048980	093087	1611	1,641,271.00
98720133	DACWO9-87-C-0041	092887	1629	1,855,923.06
98720138	CX-8000-7-9004	091187	1629	2,696,287.52
98720147	DAHAO2-87-C-0011	0715787	1541	2,275,146.95
98720148	DAHAO2-B7-C-0010	060487	1541	2,780,403.73
98720157	FO2604-87-C0048	072287	1611	188,401.53
98720164	CX8000-7-0008	043087	1611	167,910.88
98721167	CX8210-7-0008	093087	1629	300,333.00
98720176	DACWO9-87-C-0049	092987	1629	4,804,985.19
98720188	FO2604-87-00013	092887	1611	671,261.25
98720193	FO2601-87-C0050	093087	1611	109,506.67
98721103	CX8210-7-0004	062587	1611	58,809.38

98826004	FO2601-88-C88001	100987	1611	1,225,969.64
98826031	VI0IC-1642	082988	1542	9,860,296.00
98826044	DACWO9-88-C-0027	091688	1629	17,461,218.13
98826047	DACAO9-88-C-0028	061488	1629	6,117,212.00
98826062	FO2601-88-C8034	072988	1611	1,020,854.09
989926001	V1011C-1690	041489	1542	6,275,000.00
21				68,368,123.10

Charlie Taylor competed for the following contracts which were not given to him, improperly. They were given instead to Rodriguez General Contractors. Additional contracts were awarded up until the current date. Charlie Taylor has requested this information under the Freedom of Information Act. These contracts were also improperly denied to Charlie Taylor.

RODRIGUEZ GENERAL CONTRACTORS COMPANY
P.O. Box 4413, Yuma, AZ 85364

SBA Contr. #	Agency Contr #	Award Date	SIC Code	Net Amount
98826055	DACAO9 88-C-0054	092388	1541	1,176,717.00
98826070	8-CC-30-06940	093088	1629	498,702.82
98926080	DAEA18-89-C-0065	093089	1629	969,378.12
	two contracts awarded on the same day			
98926081	DAEA18-89-C-0068	093089	1521	807,423.03
99026011	50-9457-0-570	120689	1629	594,436.68
99026014	O-CC-32-00770	030290	1629	5,228,829.35
99026120	FO2604-90-C-0060	093090	1541	172,342.95

99026121	FO2604-90-C-0061	093090	1542	153,709.84
99126002	1-CC-32-01660	060791	1629	3,715,171.76
9912603	1-CC-32-01400	051791	1629	537,667.43
99126028	1-CC-30-C83C0	060391	1629	2,498,119.00
11				16,352,497.98

Mr. James P. Guyer, Phoenix District Director and Mike Enriquez, Assistant District Director improperly steered these contracts to the Hispanic owned firms to the detriment of black owned firms such as Charlie Taylor.

As an example, during a certain five year portion, Hispanic owned firms received 21 jobs for each of the firms, while black owned firms in the same district received a total of 21 jobs. Premised on the fact that approximately $88 million was given to Maya Construction during the five years prior to 1977, and the fact that Charlie Taylor Construction Company could have obtained $88 million during that period, making a profit of 20%, Charlie Taylor alleges damages in the amount of $17,673,624.62, and subtracting profits from the amount, leaves $17,298,624.62 for monetary damages. This is the amount the Plaintiff alleges as damages, although we also believe that since according to Federal Regulations 8(a) firms can receive BDE funds up to one half of the contracts, i.e. $1,500,000.00 and for non 8(a) rental equipment at four months totaling $1,600,000.00, for loss of rental of BDE equipment for four months of the year at $150,000.00 for twelve years, Plaintiff can establish a total of damages of $1,600,000.00.

THEREFORE, we respectfully request monetary damages and injunctive relief requested herein.

Respectfully submitted,

Sam Zalman Gdanski
D.C. Bar #365572
10 Topaz Court
Montebello, New York 10901

Dated: March 4, 1994

AFFIDAVIT OF SERVICE

I, Sam Z. Gdansky, hereby certify under the penalty of perjury that I submitted to Mr. Shapiro, Assistant U.S. Attorney, Civil Division, 555 4th Street, Washington, D.C. this 7th day of March 1994 a copy of the Amended Complaint postage pre-paid first class mail.

S.Z. Gdanski
10 Topaz Court
Suffern, New York 10901
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D.C. Bar 365572

Supreme Court, U.S.
FILED
NOV 27 1996

(2)

No. 96-497

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES TAYLOR CONSTRUCTION COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's dismissal of a complaint alleging that the Small Business Administration administers the Section 8(a) program of the Small Business Act, 15 U.S.C. 637(a), in a way that awards a disproportionate number of contracts in Arizona to Hispanic-owned firms.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1-A2) and the memorandum order of the district court (Pet. App. A3-A5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1995. The petition for a writ of certiorari was filed on August 21, 1995, and docketed on September 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), establishes a program to foster and promote

business enterprises of socially and economically disadvantaged persons and entities. Under that program, federal agencies contract with the Small Business Administration (SBA) to fulfill qualifying procurement needs. The SBA generally fulfills those needs by subcontracting with SBA-certified, small-business concerns. The SBA generally does not select the specific subcontractor from the pool of eligible participants. That decision is typically made by the procuring agency through competitive bidding. See 13 C.F.R. Pt. 124; Pet. App. A7-A8 (Gov't Motion for Summary Affirmance); see, *e.g.*, *Eastern Canvas Products, Inc.* v. *Brown*, 580 F.2d 675, 677-678 (D.C. Cir. 1978).

Petitioners are an African-American-owned business and its owner. The business, which is licensed to remodel and construct buildings in Arizona, qualifies as an eligible small-business concern under the Section 8(a) program. Petitioners brought this action in the United States District Court for the District of Columbia alleging, as relevant here, that the SBA awards a disproportionate share of contracts in Arizona to Hispanic-owned firms in violation of the Fifth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. See Pet. App. A18-A19. Petitioners requested declaratory relief "prohibiting the disproportionate awarding of contracts to Hispanic owned firms [and directing] a fair, appropriate setting aside of contracts to black owned firms, specifically the [petitioners]." *Id.* at A21. Petitioners also requested monetary damages of $17,298,624.62 under the Tucker Act, 28 U.S.C. 1346(a)(2). See Pet. App. A18, A25. That sum represented profits petitioners claimed they would have earned had they received the

contracts that were awarded to other contractors. *Id.* at A25.

The district court dismissed petitioners' amended complaint. The court ruled that 42 U.S.C. 2000d does not provide a basis for the relief requested by petitioners because "the statute does not apply to federal agencies, such as SBA, that directly provide government benefits." Pet. App. A4. The court also rejected petitioners' constitutional challenge to the SBA's administration of the Section 8(a) program. The court stated that the program does not "guarantee any particular group a proportionate or 'appropriate' share of business" and, in any event, there is "no basis in the law of equality" for a judicial order that directs "'a fair, appropriate setting aside of contracts to black owned firms.'" Pet. App. A4 (quoting Complaint, *id.* at A21). Finally, the court held that it lacked subject matter jurisdiction over petitioners' Tucker Act claim, because the court's statutory authority to consider such claims was limited to amounts not exceeding $10,000. *Ibid.*

Petitioners appealed, and the government moved for summary affirmance. The court of appeals affirmed the dismissal of petitioners' complaint "substantially for the reasons stated by the district court in its order filed October 18, 1994." Pet. App. A1.

ARGUMENT

The court of appeals properly affirmed the district court's dismissal of petitioners' complaint. Petitioners' contentions do not present any issue warranting review by this Court.

1. Petitioners are not entitled to relief under Title VI of the Civil Rights Act, 42 U.S.C. 2000d. Section 2000d provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As the Second Circuit has explained, Section 2000d does not provide a cause of action against federal agencies, like the SBA, that provide direct government benefits. *Soberal-Perez* v. *Heckler*, 717 F.2d 36, 38-41 (1983), cert. denied, 466 U.S. 929 (1984). Rather, it authorizes the federal government "to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government." 717 F.2d at 40 (quoting *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 329 (1978) (Brennan, J., concurring in part)). Accord *J. & L. Parking Corp.* v. *United States*, 834 F. Supp. 99, 104-105 (S.D.N.Y. 1993), aff'd, 23 F.3d 397 (2d Cir. 1994); *Fagan* v. *SBA*, 783 F. Supp. 1455, 1465-1466 n.10 (D.D.C.), aff'd, 19 F.3d 684 (D.C. Cir. 1992). There is no conflict among the courts of appeal on that question.

2. The district court also properly dismissed petitioners' claim for relief under the Fifth Amendment. As an initial matter, petitioners' contention that the SBA awarded a disproportionate amount of business to persons of Hispanic origin misconceives the role of the SBA in administering the Section 8(a) program. The SBA arranges to supply federal agencies with goods and services as a prime contractor, 15 U.S.C. 637(a), and identifies eligible Section 8(a) program participants, 13 C.F.R. 124.101-124.211. When two or

more eligible program participants are able to supply the goods or services, and the contracts meet certain monetary thresholds, the SBA regulations provide for competitive bidding. See 13 C.F.R. 124.311. But contrary to petitioners' understanding, the SBA does not select the subcontract recipients. The SBA's regulations provide that the procuring agencies shall make the awards based on the evaluation criteria set out in the bid solicitation and the Federal Acquisition Regulation. See 13 C.F.R. 124.311(f). Thus, the SBA is not a proper party-defendant for petitioners' discrimination claim, and that fact alone provided an adequate basis for the district court to dismiss petitioners' claims alleging discrimination by the SBA. See Pet. App. A8.

Even if the SBA were a proper defendant, petitioners' complaint failed to allege facts that would establish a violation of the Fifth Amendment's proscription against racial discrimination. Petitioners alleged that the SBA has given a "disproportionate amount of business to Hispanic owned firms." Pet. App. A19. But petitioners did not allege facts demonstrating that petitioners' bids or capabilities were comparable to those of the Hispanic-owned businesses and that petitioners were denied the contracts based on racial considerations. "Discrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 946 (D.C. Cir. 1982), cert. denied, 459 U.S. 1172 (1983).[1]

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[1] Unlike the plaintiff in *Fordice Construction Co.* v. *Marsh*, 773 F. Supp. 867 (S.D. Miss. 1990), upon which petitioners principally relied below (Pet. App. A4), petitioners have made no allegation that the SBA precluded them from

Furthermore, the district court was correct in observing that the relief requested by petitioners—"a declaratory judgment 'prohibiting the disproportionate awarding of contracts to hispanic owned firms [and directing] a fair, appropriate setting aside of contracts to black owned firms'"—has "no basis in the law." Pet. App. A4 (quoting Complaint, *id.* at A21). The Section 8(a) program does not guarantee any particular group a proportionate or "appropriate" share of business, Pet. App. A4, and the imposition of any such broad and rigid quota system would itself raise serious constitutional issues. Cf. *City of Richmond* v. *Croson*, 488 U.S. 469 (1989).

3. Petitioners' Tucker Act claim for contract damages was also properly dismissed. Subject to other limitations not relevant here, a district court's Tucker Act jurisdiction is limited to claims "not exceeding $10,000 in amount," 28 U.S.C. 1346(b)(2). See *United States* v. *Hohri*, 482 U.S. 64, 72 (1987) ("Tucker Act claims for more than $10,000 may be brought only in the United States [Court of Federal Claims].").

In the instant case, petitioners invoked Tucker Act jurisdiction and sought contract-related damages of more than $17,000,000. Pet. App. A18, A25. The district court correctly dismissed petitioners' Tucker Act claim for lack of subject matter jurisdiction, *id.* at A3-A5, and the court of appeals correctly affirmed that ruling, *id.* at A1-A2. Cf. *Vallely* v. *Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353 (1920) ("[c]ourts are constituted by authority and

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bidding on contracts that they were otherwise capable of performing.

they can not go beyond the power delegated to them").[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
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Attorneys

NOVEMBER 1996

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[2] Petitioners' reliance (Pet. 10) on the Ninth Circuit's decision in *In re Liberty Construction*, 9 F.3d 800 (1993), is misplaced. In that case, the court considered whether the district court had jurisdiction over plaintiff's contract-related claims under the "sue and be sued" provision of the Small Business Act, 15 U.S.C. 634(b)(1). Petitioners did not raise or rely upon the "sue and be sued" provision in the district court. See Pet. App. A15.